

## CAPITAL GUIDELINES AND ETHICAL DUTIES: MUTUALLY REINFORCING RESPONSIBILITIES

*Lawrence J. Fox\**

### I. INTRODUCTION

This year marks the 100th anniversary of the adoption by the American Bar Association of the first code of professional conduct in 1908.<sup>1</sup> Now a century later, the American Bar Association can be justifiably proud of the fact that the current iteration of the rules is in the process of being adopted in virtually every jurisdiction, albeit with each jurisdiction sometimes insisting on quirky variations on the basic themes.<sup>2</sup> But that aside, the current *Model Rules of Professional Conduct* have basically occupied the field and, as a result, lawyers take it as a given that their conduct is to be measured against the standards established in those rules and that failure to meet those standards can not only result in discipline, but also result in a claim for malpractice, fee forfeiture, sanctions, or other unfortunate results. Yet as harsh as any of those results might be, there is never a suggestion that the standards established by those rules are mere goals. Rather, there is universal recognition that the rules establish measurable levels of performance that

---

\* Partner and former Managing Partner at Drinker Biddle & Reath LLP in Philadelphia, the I. Grant Irej, Jr. Adjunct Professor at the University of Pennsylvania Law School, and Lecturer on Law at the Harvard Law School. As Chair of the ABA Death Penalty Representation Project, Mr. Fox moved the adoption of the Guidelines by the House of Delegates. He has served as a member and Chair of the American Bar Association's Standing Committee on Ethics and Professional Responsibility and was a member of the American Bar Association Ethics 2000 project, which rewrote the Model Rules. Mr. Fox is the author of *Legal Tender* and, with Susan Martyn, has written a case book, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY* (2d ed. 2008) and *THE LAW GOVERNING LAWYERS: NATIONAL RULES, STANDARDS, STATUTES, AND STATE LAWYER CODES* (4th ed. 2008). Mr. Fox and Professor Martyn also wrote *RED FLAGS: LEGAL ETHICS FOR LAWYERS and YOUR LAWYER, A USER'S GUIDE* (2006).

1. ABA CANONS OF PROF'L ETHICS (1908).

2. See S. MARTYN, L. FOX & W.B. WENDEL, *THE LAW GOVERNING LAWYERS* 109-23 (Walters Kluwer 2008) (illustrating state variations on confidentiality and conflicts of interest).

lawyers in fact are expected to achieve, day in and day out, for clients large and small, criminal and civil, on Wall Street and on Main Street.

Given that background, it is extremely instructive to review the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (“ABA Guidelines”), and related commentary and scholarship, now including the valuable *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (“Supplementary Guidelines”), through the prism of the *Model Rules of Professional Conduct*. In fact, as the author has considered this topic, he has found it presents a quite remarkable two-way street. One way, the ABA Guidelines can be seen as simply the very specific implementation of the ethical rules. As the rules apply to a lawyer handling a slip and fall case in Paducah, Kentucky, they ought also to apply to a lawyer defending an accused of a capital crime in Houston, Texas. The other way, the ABA Guidelines can be seen as providing a wonderful example of how some of the more general but, notwithstanding their generality, no less important rules of professional conduct should be evaluated in particular contexts.

Indeed, in this author’s opinion, the core principles expressed in the ABA Guidelines, commentary, and Supplementary Guidelines are no more than detailed, contextualized explanations of counsel’s existing obligations under the *Model Rules of Professional Conduct*. In providing useful guidance to both the lawyer and nonlawyer members of capital defense teams, the Supplementary Guidelines describe counsel’s comprehensive duty to “giv[e] reasonable assurance that [the conduct of nonlawyer members of the lawyer’s team] is compatible with the professional obligations of the lawyer.”<sup>3</sup> This Article will address how the Supplementary Guidelines permit all members of the defense team to recognize, understand, and abide by counsel’s duty to provide effective representation to the client, fulfilling all professional responsibilities.

## II. THE DUTY OF COMPETENCE

This analysis starts with Model Rule 1.1, which rarely raises the kind of real controversy seen in areas such as confidentiality and conflicts of interest, and is among the shortest in terms of its number of words. Rule 1.1 simply provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for

---

3. MODEL RULES OF PROF’L CONDUCT R. 5.3(a) (2007).

the representation.”<sup>4</sup> The ABA Guidelines reflect not only the importance of this rule but also the multiple complicated factors that must be met to achieve compliance with it. The ABA Guidelines set forth a thorough commentary of the critical factors one would need to evaluate to determine competence in the area of capital defense. In a way that is useful to all members of the capital defense team, the Supplementary Guidelines describe in further detail the functions that are important to competent representation.

The ABA Guidelines direct attention to the size of the legal team that is required for this cardiac surgery of legal representations. While the ABA Guidelines establish a minimum of two lawyers (a rather modest number given how often the most garden variety civil depositions are staffed with two lawyers), the ABA Guidelines make it clear that the team, in fact, has to be much larger than that. This brings us to yet another dimension of the competence question, which is the requirement that the team not only include legal talent, but also significant high quality personnel in other areas of endeavor.

In recognizing the need for personnel whose expertise is in different areas of endeavor, the ABA Guidelines are simply extrapolating from an important comment to Rule 1.1. That comment provides that it is perfectly permissible for a lawyer who wants to achieve competence in an area with which he or she is unfamiliar to associate with “a lawyer of established competence in the field in question.”<sup>5</sup> While the comment does not specifically provide for the lawyer to associate with nonlawyers in fields of inquiry in which the lawyer lacks competence, in fact the standard of care for lawyers in any matter that recognizes significant nonlegal expertise is to consult with experts in those subject matter areas. Examples abound. Lawyers handling medical malpractice cases will associate with physicians, pharmacologists, and psychiatrists. Lawyers in product failure cases will associate with engineers, metallurgists, and physicists.

The ABA Guidelines identify two specific areas as to which it is critical for the lawyer to associate with others: someone thoroughly familiar with mental or psychological disorders and a mitigation specialist who has expertise in assembling the necessary data about the background of the accused that could be used to dissuade the decision-

---

4. *Id.* at R. 1.1.

5. *Id.* at R. 1.1, cmt. 2.

maker from seeking or imposing the death penalty if the jury finds the defendant to have committed a capital crime.<sup>6</sup>

*A. Fees for an Adequate Defense*

Given the fact that the prosecution in capital cases will likely be represented by well-funded and skilled specialists,<sup>7</sup> issues of fees and workload have become central to the defense team's duty of competent performance imposed by Rule 1.1. Compensation in indigent defense is an issue that courts have grappled with for generations. Fifty years ago, Justice Black wrote: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>8</sup> In advocating for adequate fees and expenses to enable capital defense teams to perform effectively, and in acknowledging counsel's duty to seek adequate defense funding,<sup>9</sup> the Supplementary Guidelines find firm roots in the ABA Guidelines, in current constitutional doctrine, and the rules of professional conduct. In providing that nonlawyer members of the defense team be "fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed to assist counsel with the litigation of death penalty cases," Supplementary Guideline 9.1 echoes the requirement of ABA Guideline 9.1(C).<sup>10</sup>

---

6. See SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1, in 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES]. In order to be competent the defense team must also include a traditional fact investigator as well as all of the various technical experts—experts in ballistics, DNA analysis, handwriting, and other forensic fields—that the particular facts of the given case will require. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (where an indigent defendant's sanity is at issue in the case, a competent psychiatrist must be provided to aid in the defense).

7. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 9.1, commentary (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES] (noting array of formal and informal resources available to prosecution). The ABA GUIDELINES are also available online at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>.

8. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

9. See ABA GUIDELINES, *supra* note 7, at Guideline 9.1; SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 4.1(A), 9.1.

10. SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 9.1; ABA GUIDELINES, *supra* note 7, at Guideline 9.1(C) ("Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases."). Guideline 9.1(C)(2) expressly extends this requirement to mitigation specialists employed in public defender offices, mandating that they "be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector." ABA GUIDELINES, *supra* note 7, at Guideline 9.1(C)(2). Guideline 9.1(C)(3) further

Supplementary Guideline 9.1 also finds strong support in ABA Guideline 4.1, which mandates that lawyers obtain services that are “reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings” and “ensure provision of such services to private attorneys whose clients are financially unable to afford them.”<sup>11</sup> In a capital case in which the background and character of the accused are a “constitutionally indispensable” element of the life-or-death decision,<sup>12</sup> competent representation depends upon counsel’s ability to employ a mitigation specialist who has the skills to obtain the sensitive and personal information necessary to present a reliable and complete life history.<sup>13</sup>

Recognizing that adequate compensation of nonlawyer members of the team is important to effective performance of the defense function, Supplementary Guideline 9.1 also warns that “[f]lat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.”<sup>14</sup> ABA Guideline 9.1(C) uses similar language condemning such limitations on fees and expenses, and the Supplementary Guidelines make clear that this concept applies to mitigation specialists and other nonlawyer members of the defense team.<sup>15</sup> In addition, ABA Guideline 9.1(C)(3) specifically states that “[p]eriodic billing and payment should be available” to members of the defense team assisting private counsel.<sup>16</sup> The Commentary to ABA Guideline 9.1 discusses further the need for counsel to be adequately compensated, and gives examples of states like Texas and Mississippi, where qualified lawyers decline capital appointments because they simply cannot afford to accept.<sup>17</sup>

In addressing fees, the ABA Guidelines and Supplementary Guidelines are simply implementing requirements of the *Model Rules of Professional Conduct*. Model Rule 1.5 provides that a lawyer’s fee shall be “reasonable.”<sup>18</sup> The factors listed in the rule are particularly

---

requires that team members assisting private counsel should be paid at a rate commensurate with those assisting retained counsel. *Id.* at Guideline 9.1(C)(3).

11. ABA GUIDELINES, *supra* note 7, at Guideline 4.1(B).

12. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

13. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 516-17 (2003) (quoting a Maryland trial judge who felt that “not to do a social history, at least to see what you have got, to me is absolute error”). The Supreme Court found trial counsel ineffective for shortcomings that would have been avoided through the use of a mitigation specialist. *Id.* at 537-38.

14. SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 9.1.

15. ABA GUIDELINES, *supra* note 7, at Guideline 9.1(C); *see also* SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 9.1.

16. ABA GUIDELINES, *supra* note 7, at Guideline 9.1(C)(3).

17. *Id.* at Guideline 9.1, commentary.

18. MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2007).

instructive in this regard. For example, they identify the time and labor required, the novelty and difficulty of the questions involved, the skill to perform the legal services properly, whether the engagement will preclude other engagements by the lawyer, the fee customarily charged in the locality for similar legal services, and the experience, reputation, and ability of the lawyer performing the services. While issues relating to reasonable fees typically focus on fees that are too high, in fact, it is just as important that a fee not be set too low. And when one views the fee question for capital defense work (both by lawyers and nonlawyers) in light of these factors, one can see that a reasonable fee to handle capital defense should be quite generous. Few cases are more time and labor intensive, require traversing a more difficult jurisprudence, preclude other employment to a greater extent, or require more experience, than these representations. Accordingly, setting the fee too low would mean that securing the services of the lawyers and nonlawyers required would become virtually impossible, leaving only those desperate for work—but unqualified to handle it—willing to accept these engagements.<sup>19</sup>

Fee caps have been found to violate the constitutional rights of both the client and the lawyer.<sup>20</sup> Indeed, caps on fees and expenses can so lower the amount that a lawyer or nonlawyer member can hope to recoup, that the appointment becomes impossible to undertake.<sup>21</sup> This is especially true in capital cases, where the time commitments and

---

19. See Eric M. Freedman, *Mend It or End It?: The Revised ABA Capital Defense Representation Guidelines as an Opportunity to Reconsider the Death Penalty*, 2 OHIO ST. J. CRIM. L. 663, 669 (2005) (discussing inadequacy of state compensation systems and observing, “[s]ince no economically rational lawyer would choose to take a death penalty case under these circumstances, the ones who do are often, like borrowers from a usurer, those with no choice in the matter—and present the same risk of defaulting on their responsibilities”).

20. “An absolute cap on compensable hours or the amount of compensation allowed cannot co-exist with the indisputable right to effective assistance of counsel, including the right of that counsel to receive ‘adequate funding.’” *Hoffman v. Haddock*, 695 So. 2d 682, 685 (Fla. 1997); see also *State v. Young*, 172 P.3d 138, 141 (N.M. 2007) (“The inadequacy of compensation in this case makes it unlikely that any lawyer could provide effective assistance.”); cf. *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992) (affirming grant of petition for habeas corpus because petitioner was denied effective assistance of counsel, and noting, “[t]he state paid defense counsel \$11.84 per hour. Unfortunately, the justice system got only what it paid for.”). *Frederico Martinez-Macias* was released from prison after establishing his innocence of the crime for which he was sentenced to death. Bob Herbert, *A State Where Justice Is a Joke*, AUSTIN AM. STATESMAN, June 25, 1999, at A15.

21. See, e.g., *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 910 (Mass. 2004) (“The inadequacy of compensation for private attorneys who represent indigent criminal defendants has persisted for many years. The continuation of what is now an unconstitutional state of affairs cannot be tolerated.”); see also *Coulter v. State*, 804 S.W.2d 348, 359 (Ark. 1991) (Holt, C.J., concurring).

expenses are very large and can be unduly oppressive, making statutory caps inappropriate.<sup>22</sup> “[I]t is indisputable that the prosecution and defense of capital murder cases are substantially more expensive than in non-capital cases.”<sup>23</sup> Fee caps, especially in large and complicated cases, may create a conflict of interest, where the lawyer may be forced to choose between working on a case and paying his overhead.<sup>24</sup> Caps can lead to lawyers operating “‘volume practices,’ under which they have a monetary incentive to dispose of cases as quickly as possible in order to get to the next case and the next fee.”<sup>25</sup> Compensation, therefore, in capital cases should be based not upon arbitrary maxima, but rather upon “the experience and ability of the attorney, the time and labor required to perform the legal service properly, [and] the novelty and difficulty of the

22. See *Makemson v. Martin County*, 491 So. 2d 1109, 1113 (Fla. 1986) (“It has long been the trial courts, most intimately aware of the complexity of the case and the effectiveness of counsel, which have time after time found the [statutory fee cap] unconstitutional in order to exceed its guidelines and award a fee more nearly approaching fairness.”).

23. *Young*, 172 P.3d at 141-42; see Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1097-98 (2003) (“The death penalty is expensive. . . . [A] state’s decision to have a criminal justice system in which death is available as a sanction necessarily entails substantially higher costs than the contrary decision does.”); see also *United States v. Taveras*, No. 04-156, 2008 WL 565495, at \*1 (E.D.N.Y. Feb. 29, 2008) (noting millions of dollars in costs entailed by “the insistence of the government on a death sentence” in a case where the defendant was willing to plead to a sentence that would keep him in prison for life).

24. Recently, funding restrictions prompted a court to grant habeas corpus relief to a capital prisoner because trial counsel “was forced to choose between what was best for his client and what was best for his family—a conflict of interest in the classic sense.” *Harlow v. Murphy*, No. 05-CV-039-B, slip op. at 32 (D. Wyo. filed Feb. 15, 2008); see also *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) (“A compensation system that results in substantial losses to the appointed attorney or his firm simply cannot be deemed adequate.”); *Booth v. Maryland*, 940 F. Supp. 849, 854 (D. Md. 1996) (finding that overhead incurred in representing a capital defendant to be \$53/hour, \$18/hour more than the \$35/hour payment. An attorney lost even more per hour, however, if he worked more than allowed by the statutory maximum); Thomas F. Liotti, *Does Gideon Still Make a Difference?*, 2 N.Y. CITY L. REV. 105, 134-35 (1998) (“The defendant will not receive a fair trial when his counsel’s decisions are affected by obligations to persons other than the defendant.”); Benjamin Robert Ogletree, Comment, *The Antiterrorism and Effective Death Penalty Act of 1996, Chapter 154: The Key to the Courthouse Door or Slaughterhouse Justice?*, 47 CATH. U. L. REV. 603, 662 (1998) (“For lawyers who rely on paying clients for income, compensation caps often create conflicts of interest. Once the permitted number of compensable hours is expended, counsel has no financial incentive to devote additional time to representing an indigent client.”).

25. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 688 (2007); see also Albert L. Vreeland, II, Note, *The Breath of Unfee’d Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 628 (1991) (“[F]ee limitations deprive indigent defendants of their right to effective assistance of counsel.”).

issues involved.”<sup>26</sup> Statutory maxima are grossly unfair, and are not imposed upon the prosecution, or indeed other necessary participants in capital trials.<sup>27</sup> Courts should also recognize that “[t]he demands of handling a death penalty case frequently preclude acceptance of other employment”<sup>28</sup> not only for the lawyer, but for nonlawyer members of the defense team as well.

In rejecting fee caps as unreasonable under these circumstances, the ABA Guidelines and Supplementary Guidelines are doing no more than echoing professional responsibility concerns that have been raised time and again in a far more mundane context. Insurance companies that hire counsel for their insureds have regularly tried to limit the cost of defense they have contractually agreed to provide to their insureds by using various methods, including fee caps and captive law firms—firms that purport to be independent, but in fact are simply lawyers employed full time by the insurance industry. This use of fee caps and the use of captive law firms have both been condemned in many jurisdictions as creating a conflict of interest for the lawyer so retained, with the result that these practices violate the *Model Rules of Professional Conduct*.<sup>29</sup> For sure, if these practices are found wanting in that context, they are even more in violation of the *Model Rules of Professional Conduct* when the client’s life is on the line.

It is highly appropriate that the ABA Guidelines and the Supplementary Guidelines specifically address the adequacy of the compensation for mitigation specialists. The focus of the Rules and the ABA Guidelines, after all, “is the defendant’s right to effective representation rather than the attorney’s right to fair compensation.”<sup>30</sup> Nonlawyer team members, like lawyers, incur overhead and must expend significant resources for travel and expenses involved in the

---

26. Arnold v. Kemp, 813 S.W.2d 770, 776 (Ark. 1991); see ABA GUIDELINES, *supra* note 7, at Guideline 9.1, commentary; see also State ex rel. Stephan v. Smith, 747 P.2d 816, 841 (Kan. 1987) (“It is [attorneys’] learned and reflective thought, their recommendations, suggestions, directions, plans, diagnoses, and advice that is of value to the persons they serve.”).

27. Young, 172 P.3d at 140-41 (“Defense counsel may be the only participants in the trial who are not paid at an hourly rate. The videographer, who merely records witness interviews, receives \$75.00 per hour, and has received at least three to four times the amount that the attorneys have been compensated.”) (footnote and internal quotations omitted).

28. *Id.* at 142.

29. See In re Asbestos Litigation, 90 F.3d 963, 977 (1996).

30. Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986); see ABA GUIDELINES, *supra* note 7, at Guideline 9.1, commentary (noting that it is clients “and the justice system—rather than the lawyers (who can always move to more lucrative fields) that are victimized” when inadequate compensation leaves “capital defense representation to inexperienced or outright incompetent counsel”).



investigation and preparation of a capital case.<sup>31</sup> This is especially true of the mitigation specialist, who will frequently need to travel to distant locations for lengthy periods of time to interview friends, family members, and other potential witnesses.<sup>32</sup> Because mitigation specialists typically earn a lower hourly rate than counsel, and incur extensive out-of-pocket travel expenses, they cannot survive without timely interim billing and payment of fees and expenses. As the ABA Guidelines very appropriately recognize:

[A]ny compensation system that fails to reflect the extraordinary responsibilities and commitment required of all members of the defense team in death penalty cases, that does not provide for extra payments when unusually burdensome representation is provided, or that does not provide for the periodic payment of fees to all members of the defense team will not succeed in obtaining the high quality legal representation required by these Guidelines.<sup>33</sup>

#### *B. Limiting the Defense Team's Workload*

In the area of competence, the ABA Guidelines and the Supplementary Guidelines properly focus attention on the important question of workload. Model Rule 1.3 ("Diligence") goes right to its important point: "A lawyer shall act with reasonable diligence and promptness in representing a client."<sup>34</sup>

Significantly, the ABA Guidelines expressly differentiate between the concept of workload and caseload, explaining that workload is "caseload adjusted by factors such as case complexity, support services, and an attorney's non-representational duties."<sup>35</sup> Lawyers defending capital cases must have a more limited caseload than those defending

---

31. *State v. Wigley*, 624 So. 2d 425, 428 (La. 1993) (awarding expenses past the statutory maximum and noting that "according to testimony at the district court, as the practice of criminal law has become more specialized and technical, the funds required for investigation, experts, and scientific tests have increased considerably").

32. See Gregory J. Kuykendall, Alicia Amezcua-Rodriguez & Mark Warren, *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989 (2008).

33. ABA GUIDELINES, *supra* note 7, at Guideline 9.1, commentary (footnote omitted).

34. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007).

35. ABA GUIDELINES, *supra* note 7, at Guideline 6.1, commentary.

noncapital ones,<sup>36</sup> because capital defense “requires vastly more time and effort by counsel than noncapital matters.”<sup>37</sup>

A sleep-deprived member of a capital defense team, no matter how talented and dedicated, cannot provide competent representation if his or her workload does not provide the time necessary to handle these extraordinarily taxing engagements. The most brilliant lawyer or mitigation specialist in the world, no matter how energetic, can only address a very small number of capital cases simultaneously to meet the standards of the ABA Guidelines, and Model Rule 1.1 as well.<sup>38</sup> The teaching of ABA Guideline 10.3 (Obligations of Counsel Respecting Workload) certainly is an attempt to capture that part of the diligence requirement that does not reflect the individual lawyer’s intelligence, motivation, or commitment, but rather the obligation to avoid balancing too many responsibilities.<sup>39</sup> Capital cases are intense emotionally and demanding of one’s time.<sup>40</sup> The best of intentions cannot overcome an excessive workload. Any given case could easily require more than two full-time lawyers, demanding the retention of additional personnel. Adding to these lawyers’ workload the responsibility for multiple cases can guarantee a violation of ABA Guideline 10.3 and Model Rule 1.3. Excessive workload, a 2004 Spangenberg Group report found, causes

---

36. See OFFICE OF JUSTICE PROGRAMS, NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE 3 (2000) (“[L]awyers often have unmanageable caseloads (700 or more in a year).”).

37. ABA GUIDELINES, *supra* note 7, at Guideline 6.1, commentary (“For example, one study found that over the entire course of a case, defense attorneys in federal capital cases bill for over twelve times as many hours as in noncapital homicide cases.”).

38. In recognition of these realities, the Guidelines unequivocally mandate that, regardless of the mechanism through which capital defense services are delivered, both the design of the system at the structural level and its implementation at the level of the individual lawyer be such as to ensure that workloads are kept to a level that insures that the capital client receives high quality legal representation. See ABA GUIDELINES, *supra* note 7, at Guideline 6.1 (describing obligations of “Responsible Agency”); *id.* at Guideline 10.3 (describing “Obligations of Counsel With Respect to Workload”).

39. See Freedman, *supra* note 23, at 1102 (“Even a skilled lawyer making best efforts to defend her client competently is probably engaged in a foredoomed project if she is not part of a system that provides her with the back-up necessary to perform effectively.”).

40. See Comm. on Civ. Rts., Ass’n of the Bar of the City of N.Y., Legislative Modification of Federal Habeas Corpus in Capital Cases, 44 REC. ASS’N OF THE BAR OF THE CITY OF N.Y. 848, 854 (1989).

[Undertaking capital representation] means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must endure the draining emotional effects of one’s personal responsibility for the outcome.

*Id.*

“even the most well-intentioned advocates [to be] overwhelmed, jeopardizing their clients’ constitutional right to effective counsel.”<sup>41</sup>

This is a serious ethical issue.<sup>42</sup> Model Rule 1.1 imposes a duty of competence, and Model Rule 1.3 establishes that the lawyer owes the client a duty of diligence.<sup>43</sup> Both duties are jeopardized by heavy workloads. The commentary to Model Rule 1.3 specifically requires that a lawyer limit his workload in order to ensure that he is diligent.<sup>44</sup> Model Rule 5.1 further requires that a supervisor take reasonable measures to ensure that all lawyer-employees operate within the *Model Rules of Professional Conduct*.<sup>45</sup> Where a supervisor issues an order that results in the lawyer’s violation of the Model Rules, ratifies such conduct, or fails to take action to mitigate, the supervisor is held accountable for the violation.<sup>46</sup>

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility (“Ethics Committee”), in response to a request from the ABA Standing Committee on Legal Aid and Indigent Defense (“SCLAID”) and the National Legal Aid and Defender Association (“NLADA”), issued a formal opinion examining the issue of lawyer workload in the context of whether burdensome public defender caseloads comply with these Professional Rules.<sup>47</sup> The opinion, 06-441, addressed “the ethical responsibilities of lawyers, whether employed in the capacity of public defenders or otherwise, who represent indigent persons charged with criminal offenses, when the lawyers’ workloads prevent them from providing competent and diligent representation to all their clients.”<sup>48</sup> It is the first time that the Ethics Committee has ever “dealt with the pervasive national problem of excessive caseloads of public defenders and other lawyers who represent the indigent accused

---

41. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 2 (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf> (prepared by The Spangenberg Group for the Bureau of Justice Association).

42. See generally Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 914, 920 (2005) (noting the “depressing but undeniable reality” that public defenders’ workloads force them to “[ration] their resources among clients” and concluding that ethical standards forbid defense counsel from “carry[ing] a workload that interferes with [a] minimum standard of competence”).

43. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2007).

44. *Id.* at R. 1.3, cmt. 2 (2007) (nothing that the attorney’s workload “must be controlled so that each matter can be handled competently”).

45. *Id.* at R. 5.1(b) (2007).

46. *Id.* at R. 5.1(c) (2007).

47. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006) (discussing ethical obligations of lawyers who represent indigent defendants when excessive caseloads interfere with competent representation).

48. *Id.* at 1-2.

in criminal proceedings.”<sup>49</sup> The Ethics Committee noted that the issue of burdensome caseloads of criminal defense counsel differed from that of civil legal aid lawyers, “who normally are neither court appointed nor under contracts sometimes requiring them to represent large numbers of clients.”<sup>50</sup>

The ethics opinion expressly interprets Model Rules 1.1, 1.2(a), 1.3, and 1.4 as requiring lawyers to “control workload so each matter can be handled competently,”<sup>51</sup> and places responsibility upon both the defense lawyer and, if at a public defender’s office, his supervisor. The Ethics Committee wrote that “[i]f a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation.”<sup>52</sup> The Ethics Committee suggests three ways in which a lawyer in a public defender’s office may seek to reduce workload: the lawyer can transfer “non-representational responsibilities within the office,” refuse new cases, or transfer cases to another lawyer.<sup>53</sup> The opinion directs the lawyer first to approach her supervisor and then, if the supervisor does not take action, file a motion with the court.<sup>54</sup> The option that the lawyer chooses “will depend on the environment in which that lawyer works, keeping in mind that a lawyer’s primary obligation is to existing clients.”<sup>55</sup>

In addition, the ethics opinion makes supervisors accountable for workload problems. In a public defender’s office, it is the duty of the supervisor to “monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate.”<sup>56</sup> The Ethics Committee suggests four mechanisms through which the supervisor may accomplish this mandate.<sup>57</sup> In addition to transferring cases or non-representational responsibility to other subordinate lawyers, the supervisor may support the lawyer’s motion to withdraw in front of a

---

49. Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, CHAMPION, Dec. 2006, at 10.

50. *Id.* at 11.

51. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441, at 3 (2006).

52. *Id.* at 4.

53. *Id.* at 5.

54. *Id.* at 5-6.

55. Oregon State Bar, Formal Op. 2007-178 (2007). The Oregon opinion largely mirrors ABA Formal Op. 06-441, however, it notes that ABA Formal Op. 06-441 does not address the ethical obligation of attorneys “involved in the process of contracting for the provision of public defender services.”

56. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441, at 7 (2006).

57. *Id.*

court. If the court does not permit the withdrawal, it is the supervisor's responsibility to provide the lawyer with the necessary resources "to represent the client(s) in a manner consistent with the Rules of Professional Conduct."<sup>58</sup> "If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, under [Model] Rule 5.1(c), the supervisor himself is responsible for the subordinate's violation of the Rules of Professional Conduct."<sup>59</sup> The opinion notes the issue of scarcity of resources, but determines that "[i]n the final analysis, however, each client is entitled to competent and diligent representation."<sup>60</sup>

The Ethics Committee's opinion concludes that "[a]ll lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently."<sup>61</sup> The opinion "is enormously important because it furnishes potent ammunition for defenders seeking relief from excessive caseloads before judges and from those in charge of their offices."<sup>62</sup> It seeks to address and alleviate a major systemwide problem—the unreasonable workloads of those who seek to provide indigent defense. State courts and state ethics committees have in the past attempted to address this serious concern.<sup>63</sup> However, "none of the

---

58. *Id.* The opinion cites to several state cases for support in holding supervisors accountable under Model Rule 5.1(c). *See, e.g., id.* at 4 n.12 (citing Attorney Grievance Comm'n v. Ficker, 706 A.2d 1045, 1051-52 (Md. 1998)); *id.* at 6 n.21 (citing Mich. Bar Comm. on Prof'l & Jud. Ethics Op. RI-252 (1996)).

59. *Id.* at 8 (footnote omitted); *see also* MODEL RULES OF PROF'L CONDUCT R. 5.1(c) (2007).

60. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441, at 8 (2006); *see also* Harris v. Champion, 938 F.2d 1062, 1070-71 (10th Cir. 1991) (finding a lack of funding and possibility of mismanagement by the public defender not an acceptable excuse for backlog and delay of two plus years for filing of direct appeals).

61. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441, at 9 (2006).

62. Lefstein & Vagenas, *supra* note 49, at 11. *But see* Jessica Hafkin, *A Lawyer's Ethical Obligation to Refuse New Cases or to Withdraw from Existing Ones when Faced with Excessive Caseloads that Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants*, 20 GEO. J. LEGAL ETHICS 657, 663-67 (2007) (questioning the practical application of transferring cases from overloaded public defenders because it assumes that there are public defenders who are not overloaded, and calling for systemic change).

63. Several courts have also attempted in the past to deal with this problem. *See* Miranda v. Clark County, 319 F.3d 465, 469-71 (9th Cir. 2003) (For the purposes of a civil § 1983 action, the head of the public defender system may be held liable for implementing policies which failed to provide adequate resources to defendants, thus depriving them of ineffective assistance of counsel. This case involves the Clark County, Nevada, public defender system, which apparently had policies of administering polygraph tests and then allotting minimal resources to defendants who failed and assigning to capital cases attorneys with the least experience and no capital defense training.); *Harris*, 938 F.2d at 1070-71 (holding a backlog and two-plus year delay for direct appeal presumptively unreasonable and may constitute ineffective assistance of counsel); *People v. Smith*,

state bar ethics opinions are as comprehensive as the ABA's opinion and none of the other opinions were rendered by an ethics body of comparable prestige that speaks on behalf of the largest group of lawyers in America."<sup>64</sup> "The relentless pressure on public defenders is not likely to let up. [And disciplinary authorities are not] likely to give [Public Defenders] a pass on the obligation to provide competent, diligent representation to clients."<sup>65</sup> Nor should they.

Workload issues, however, confront not only lawyers, regardless of the settings in which they practice,<sup>66</sup> but all members of the defense team. Accordingly, the Supplementary Guidelines stress counsel's duty to "ensure that the workload of defense team members in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation."<sup>67</sup> Supplementary Guideline 6.1 further requires public defender offices that maintain mitigation specialists on staff to "implement mechanisms to ensure that their workload is maintained at a level that enables them to provide each client with high quality services."<sup>68</sup> Supplementary Guideline 10.3 states the corollary that each and every team member limit his or her workload in order "to provide each client with high quality legal representation" that comports with the Supplementary Guidelines and the ABA Guidelines.<sup>69</sup>

Just as lawyers' workloads must be kept at reasonable levels to ensure competent representation, so too must capital defense counsel monitor the workloads of the nonlawyer members of the defense team<sup>70</sup>

---

No. 04PDJ108, 2006 WL 1681794, at \*1 (Colo. O.P.D.J. June 6, 2006) (approving three year suspension from practice of law for sole practitioner who "admittedly carried an excessive caseload. As a result, he neglected several client matters and knowingly failed to communicate with a number of his clients."); *State v. Peart*, 621 So. 2d 780, 790 (La. 1993) ("[B]ecause of the excessive caseloads and the insufficient support with which their attorneys must work, indigent defendants in Section E are generally not provided with the effective assistance of counsel the constitution requires.").

64. Lefstein & Vagenas, *supra* note 49, at 16. For a discussion of various state systems implemented to deal with excessive caseloads prior to ABA Formal Op. 06-441, see Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 253-58 (2004).

65. Eileen Libby, *Keep Up the Good Work: Ethics Rules on Competent Representation Make No Exception for Public Defenders*, A.B.A. J., Oct. 2006, at 24, 24.

66. *See supra* note 38.

67. SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 6.1.

68. *Id.*

69. *Id.* at Guideline 10.3.

70. ABA GUIDELINES, *supra* note 7, at Guideline 6.1. As indicated, Guideline 6.1 calls for the Responsible Agency to limit the attorney's workload. *See supra* note 38. Guideline 10.3 imposes that duty on the attorney himself. ABA GUIDELINES, *supra* note 7, at Guideline 10.3.

so that the client will receive, in fact, the benefits of their work as contemplated by ABA Guideline 4.1. As one mitigation specialist has observed: “An uncommonly gifted individual with expertise ranging from DNA to the DSM cannot diligently pursue the two investigative tracks that are part of every capital case . . . .”<sup>71</sup> If one individual is assigned to make that attempt, then lead counsel has violated the duty imposed by ABA Guideline 10.4 to assemble a defense team that provides the client with high quality legal representation.

### C. *The Scope of Representation*

Model Rule 1.2(c) provides that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>72</sup> The comment to the rule admonishes the lawyer that “[a]lthough this Rule affords the lawyer and client substantial latitude, . . . the limitation must be reasonable under the circumstances.”<sup>73</sup> Handling a capital case provides a new dimension in answering the question of limitations. In a capital case, the nature and complexity of the issues, the sheer magnitude of the work required for competent performance, and the need—strongly emphasized by ABA Guideline 10.10.1 and its Commentary, and reinforced by Supplementary Guideline 10.11(A)—to present “a coherent, harmonious theme that span[s] both the guilt and penalty”<sup>74</sup> issues, all weigh heavily against the validity of any limitations on the scope of the representation.<sup>75</sup> Quite simply, because of all that is at stake, no scope limitation could be viewed as reasonable here. And a review of the excellent ABA Guidelines is a testimonial to that point.

Once the team is established, the broadest planning and investigation must take place. Only with a comprehensive planning effort will the categories of areas of investigation be fully identified and only with a complete investigation can counsel be prepared for

---

71. Russell Stetler, *Capital Cases: Mitigation Investigation: A Duty That Demands Expert Help But Can't Be Delegated*, CHAMPION, Mar. 2007, at 61, 62.

72. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2007).

73. *Id.* at R. 1.2(c), cmt. (2007).

74. Melissa E. Whitman, *Communicating with Capital Juries: How Life Versus Death Decisions Are Made, What Persuades, and How to Most Effectively Communicate the Need for a Verdict of Life*, 11 CAP. DEF. J. 263, 280 (1999).

75. Of course, it is perfectly appropriate for a fully staffed defense team to assign any given member of the team to specific issues of law or fact, such as jury selection, complex mental health or scientific evidence, or other specialized matters, just so there is no scope limitation on the responsibilities of the team itself. See SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 10.4(B).

negotiation or trial. But this is only the beginning. Counsel must seize those opportunities that arise over the many years of the post-conviction course of typical capital cases to negotiate a plea, persuade the prosecutor to abandon the death sentence, or gather those facts that will eliminate the threat of capital punishment because the crime can be shown to be not death eligible or indeed because yet another look at the evidence shows the client to be simply innocent.<sup>76</sup>

The ABA Guidelines provide a useful catalogue of areas of inquiry. They suggest broad categories—medical history, family and social history, educational history, military service, employment and training history, and prior bouts with the law—and provide extensive examples of what is included in their ambit. The Supplementary Guidelines describe in additional useful detail the existing obligations and methods of competent capital representation.<sup>77</sup>

From the beginning, both the guilt-innocence and the penalty phases must be the equally important double focus of the defense. As to the former, investigation must be made of all evidence regarding the crime—testimonial, forensic, whatever—regardless of any admission of guilt or how overwhelming the likelihood of guilt might be.<sup>78</sup> The fact that inadequate investigations—failing to uncover flawed eyewitness testimony, false confessions, mendacious jailhouse informants and unreliable forensic evidence—have contributed to so many wrongful convictions<sup>79</sup> only heightens the importance of an expanded scope of service for the ethical lawyer at all stages of the representation, who must throughout the proceedings deploy intense skepticism as to all aspects of the state's case.<sup>80</sup> The ABA Guidelines remind the conscientious lawyer to repeatedly investigate potential witnesses on various matters—facts, abilities and disabilities, life history, to secure all

---

76. See Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325, 335-36 (2003) (citing relevant Guidelines and Commentary).

77. See Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Capital Defense Teams*, 36 HOFSTRA L. REV. 693, 710-11 (2008).

78. ABA GUIDELINES, *supra* note 7, at Guideline 10.7(A).

79. See WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* 37-42 (2006); see also Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

80. See ABA GUIDELINES, *supra* note 7, at Guideline 10.7, commentary (drawing on this experience to "underscore[] the importance of defense counsel's duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses," notwithstanding that the "circumstances appear overwhelmingly indicative of guilt") (footnote omitted).



information available from the prosecution and police files,<sup>81</sup> to examine physical evidence, to visit the scene, and to be ever mindful of the changes in the relevant environment. The law changes; peoples' perspectives change; technology changes.<sup>82</sup>

These ongoing responsibilities of the lawyer may not be limited by the client.<sup>83</sup> This is because the client cannot make an informed decision as to how to proceed until the client knows what is possible, and it is the lawyer's ethical duty to present the full smorgasbord, even to an uninterested client.<sup>84</sup>

Thus a complete investigation must be followed by comprehensive preparation for trial, while simultaneously preserving any possibility of a plea discussion. The scope of counsel's responsibilities at trial are similarly broad, preparing for the direct examination of defense witnesses and for the cross-examination of prosecution witnesses, preparing exhibits and challenging any of the prosecution, preparing for jury selection with all the intelligence about the particular venue one can muster, and intense preparation of approaches likely to overcome the inherent bias of being forced to face a death-qualified jury. Likewise, counsel representing the client in appellate, post-conviction, or clemency proceedings must also utilize the diligent team approach in exploring facts and issues that may have been unavailable to the sentencer because of trial counsel's ineffectiveness,<sup>85</sup> because of the refusal to adequately fund prior representation at trial, appeal or in previous post-conviction

---

81. See *Henderson v. Sargent*, 926 F.2d 706, 711-12 (8th Cir. 1991) (granting writ where trial counsel's performance at guilt phase was ineffective in lacking "an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories," and state post-conviction counsel was ineffective for failing to perform full analysis of "trial testimony and the police record [and failing to conduct] interviews with the persons who testified at trial or had firsthand knowledge of the events surrounding the murder").

82. See ABA GUIDELINES, *supra* note 7, at Guideline 10.9.1, commentary.

As in other sorts of protracted litigation, circumstances change over time (e.g., through replacement of a prosecutor, death of a prosecution witness, alteration in viewpoint of a key family member of the client or the victim, favorable developments in the law or the litigation, reconsideration by the client) and as they do new possibilities arise. Whenever they do, counsel must pursue them.

*Id.* (footnote omitted).

83. See *id.* at Guideline 10.7, commentary.

84. In *Rompilla v. Beard*, 545 U.S. 374 (2005), counsel faced the prototypical uninterested client. When counsel attempted to discuss a mitigation strategy, "Rompilla told them he was 'bored being here listening' and returned to his cell." *Id.* at 381. Counsel were nevertheless found ineffective for failing to conduct a reasonable investigation into Rompilla's mitigation case. *Id.* at 383.

85. See *Williams v. Taylor*, 529 U.S. 362, 395 (2000).

proceedings,<sup>86</sup> because of the failure of the prosecution to disclose exculpatory information material to punishment or guilt,<sup>87</sup> or because, for whatever reason, the proceedings so far—however lengthy they may have been—have simply failed to produce a just result.<sup>88</sup>

At no stage of a capital representation may counsel limit the scope of the services to be provided without risking violation of Model Rule 1.2.<sup>89</sup>

### III. THE DUTIES OF LOYALTY AND INDEPENDENT PROFESSIONAL JUDGMENT

Central to the ethical provision of legal services in any setting is the lawyer's duty to exercise independent judgment on the client's behalf. The duty of loyalty and the duty to use independent judgment are two sides of the same coin, and go much deeper than simply avoiding the representation of conflicting interests.

#### A. *The Duty to Use Independent Professional Judgment on Behalf of the Client*

The *Model Rules of Professional Conduct* insist on lawyer independence, and prohibit counsel from accepting legal employment if “a nonlawyer has the right to direct or control the professional judgment of a lawyer.”<sup>90</sup> Indeed, in a criminal case, this duty is an essential component of the constitutional right to counsel. “Government violates

---

86. See, e.g., *Harlow v. Murphy*, No. 05-CV-039-B, slip op. at 30-32 (D. Wyo. filed Feb. 15, 2008) (insufficient funding prevented counsel from conducting important witness interviews); see also *Williams v. Taylor*, 529 U.S. 420, 442 (2000) (finding that the prisoner's claims were not barred from federal habeas review where state post-conviction counsel unsuccessfully asked the state courts for funds to employ an expert and an investigator to investigate suspected jury misconduct claims).

87. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 84 (1963) (the State failed to disclose mitigating evidence in the government's possession); *Kyles v. Whitley*, 514 U.S. 419, 428-29 (1995) (the State failed to disclose impeachment evidence material to the issue of guilt or innocence).

88. State *ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548-49 (Mo. 2003) (en banc).

89. Moreover, as the Guidelines and Commentary appropriately note, this stricture is not limited by the contours of the capital litigation itself. There are many situations throughout the course of a typical capital representation in which the lawyer's ethical duty may require the pursuit of collateral litigation or administrative advocacy. For a representative collection of such instances, see ABA GUIDELINES, *supra* note 7, at Guideline 1.1, commentary and Guideline 10.8, commentary. To take just one example, counsel's duty to pursue a method-of-execution challenge is in no way lessened because it is properly asserted as an action under Section 1983 rather than as a claim in a habeas corpus petition. See *Hill v. McDonough*, 547 U.S. 573, 579, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 644 (2004).

90. MODEL RULES OF PROF'L CONDUCT R. 5.4(d)(3) (2007).

the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”<sup>91</sup>

Both the ABA Guidelines and the Supplementary Guidelines implement this mandate. The multidisciplinary team is designed to support, not supplant, counsel’s duty to exercise independent professional judgment on behalf of the client. The ABA Guidelines are based on the recognition that although “the mitigation function is multifaceted and multi-disciplinary, . . . the ultimate responsibility for the investigation of such issues rests irrevocably with counsel.”<sup>92</sup> Hence, the Introduction to the Supplementary Guidelines declares: “The duty to investigate, develop and pursue avenues relevant to mitigation of the offense or penalty, and to effectively communicate the fruits of those efforts to the decision-makers, rests upon defense counsel.”<sup>93</sup> The Supplementary Guidelines further provide that the nonlawyer defense team members—investigators, mitigation specialists, and members of counsel’s staff—are “agents of defense counsel.”<sup>94</sup>

These provisions reflect the “prevailing professional norms for . . . capital defense teams.”<sup>95</sup> Further, the directions of the Supplementary Guidelines assure that a nonlawyer who assists a lawyer in the delivery of legal services will act in a manner consistent with the lawyer’s professional obligations.<sup>96</sup>

### B. *The Continuing Duty of Loyalty to the Client*

In 2003, this author wrote about the trial lawyer’s natural tendency to be influenced by considerations antagonistic to the interests of his client. No one wants to be accused of being ineffective, and trial lawyers may feel that the adverse result of the trial was due in large part to decisions made by the client, such as declining a reasonable plea offer or failing to cooperate in the investigation.<sup>97</sup> In spite of this potential antipathy, the ethical obligations of trial counsel—embodied in ABA Guideline 10.13 (The Duty to Facilitate the Work of Successor

91. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

92. SUPPLEMENTARY GUIDELINES, *supra* note 6, at Introduction; *see also* ABA GUIDELINES, *supra* note 7, at Guideline 10.4(B) (“Lead counsel bears overall responsibility for the performance of the defense team.”).

93. SUPPLEMENTARY GUIDELINES, *supra* note 6, at Introduction.

94. *Id.* at Guideline 4.1(C).

95. *Id.* at Guideline 1.1.

96. *Id.* at Guideline 4.1(C).

97. Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1185-86 (2003).

Counsel)—require them to “put those feelings aside to determine how they can help with the habeas proceedings.”<sup>98</sup> This obligation derives from multiple sources, including the continued duty to maintain confidentiality,<sup>99</sup> the continued duty to “protect the client’s interest to the extent reasonably practicable,”<sup>100</sup> the duty to facilitate successor counsel’s work by turning over a “complete” and “well-organized” file,<sup>101</sup> and the lawyer’s fiduciary duty to “put the client’s interests ahead of his or her own and inform the client of [any] failing.”<sup>102</sup> “[I]n order to give real meaning to [Model] Rule 1.16’s injunction to protect the client upon withdrawal,” a lawyer whose former client faces the ultimate sanction must cooperate fully with successor counsel.<sup>103</sup>

To what extent are the obligations to assist appellate and post-conviction counsel shared by the nonlawyer members of the defense team? The Supplementary Guidelines provide appropriate guidance on these issues:

All members of the defense team are agents of defense counsel. They are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client. The privileges and protections applicable to the work of all defense team members derive from their role as agents of defense counsel. The confidentiality of communication with persons providing services pursuant to court appointment should be protected to the same extent as if such persons were privately retained. *Like counsel, non-attorney members of the defense team have a duty to maintain complete and accurate files, including records that may assist*

98. *Id.* at 1186; see also ABA GUIDELINES, *supra* note 7, at Guideline 10.13.

99. See MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. (2007) (“The duty of confidentiality continues after the client-lawyer relationship has terminated.”). While an allegation of ineffective assistance of trial counsel may result in an implied waiver of the attorney-client or work-product privileges, such a waiver permits former counsel “to testify in response to proper questions and no more.” Fox, *supra* note 97, at 1187. The waiver does not permit trial counsel to meet with the prosecutor, and trial counsel must provide successor counsel with an opportunity to “raise all appropriate objections, including those addressing the scope of the waiver.” *Id.* Rules 1.6 and 3.4 make it clear that it is impermissible for the prosecution to “seek privileged or confidential information from the former counsel.” *Id.* at 1188 (citing *Ackerman v. Nat’l Prop. Analysts*, 887 F. Supp. 510, 518-19 (S.D.N.Y. 1993); *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992), *amended and reconsidered on other grounds*, 144 F.R.D. 73 (E.D. La. 1992); *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651, 654, 657 (M.D. Fla. 1992); *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712, 724-28 (D. Conn. 1991)).

100. Fox, *supra* note 97, at 1189 (citing MODEL RULES OF PROF’L CONDUCT R. 1.16 (1999)).

101. *Id.* at 1190. Indeed, counsel have been disciplined for failing to provide client files to successor counsel. *In re Cooper*, 729 N.W.2d 206, 209 (Wis. 2007).

102. Fox, *supra* note 97, at 1191 (citing *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 491 P.2d 421 (Cal. 1971); *McClung v. Johnson*, 620 S.W.2d 644 (Tex. Civ. App. 1981)).

103. *Id.* at 1192-93.

*successor counsel in documenting attempts to comply with these Guidelines.*<sup>104</sup>

Because the Constitution places the obligation to conduct a reasonable investigation and to make reasonable strategic decisions squarely on the shoulders of defense counsel,<sup>105</sup> nonlawyer members of the defense team must abide by counsel's decisions. In the course of defending a capital case, situations may arise in which highly trained nonlawyer members of the team disagree with the judgment of counsel, or feel that counsel is not approaching the case with the appropriate level of diligence. The Supplementary Guidelines contain two provisions which appropriately address such a situation. First, they acknowledge that "based on consultation with team members and experts, . . . [c]ounsel decides how mitigation evidence will be presented."<sup>106</sup>

Second, and equally important, the Supplementary Guidelines provide that "non-attorney members of the defense team have a duty to maintain complete and accurate files, including records that may assist successor counsel in documenting attempts to comply with these Guidelines."<sup>107</sup>

The mitigation specialist's file can be an important source of information for post-conviction counsel, and can protect the client from counsel's lapses in performance. For example, in a recent decision granting habeas corpus relief, the district court relied on a memo from the mitigation specialist "less than two months after the offense, identifying a number of witnesses in Nebraska who needed to be interviewed as part of the investigation."<sup>108</sup> The mitigation specialist's paper trail of attempts to obtain funding to conduct necessary mitigation investigation was important to the district court's conclusion that defense counsel was on notice of "powerful mitigation evidence," which

---

104. SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guidelines 4.1(C) (emphasis added).

105. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). The Supplementary Guidelines reflect this recognition of counsel's role:

Counsel bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case. It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client. It is therefore incumbent upon the defense to interview all relevant persons and obtain all relevant records and documents that enable the defense to develop and implement an effective defense strategy.

SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 10.4(A).

106. SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 10.4(B).

107. *Id.* at Guideline 4.1(C).

108. *Harlow v. Murphy*, No. 05-CV-039-B, slip op. at 40 (D. Wyo. filed Feb. 15, 2008).

“would have tipped the scales for one or more jurors on the issue of punishment.”<sup>109</sup> Thus, the Supplementary Guidelines provide a blueprint for a working relationship among the defense team that both preserves “the guiding hand of counsel at every step in the proceedings,”<sup>110</sup> and protects the client’s right to a remedy from counsel’s deficient performance.

#### IV. THE DUTY TO COMMUNICATE CONFIDENTIALLY WITH THE CLIENT

As former Alabama Court of Criminal Appeals Judge William Bowen points out: “It is unreasonable to expect anyone in [a capital defendant’s] stressful circumstances to trust an attorney he had just met.”<sup>111</sup> A primary function of the mitigation specialist is to facilitate communication between the client and the lawyer. The law protects and facilitates communications between the client and agents of the lawyer who are necessary to the lawyer’s representation, such as file clerks, secretaries, or paralegal assistants.<sup>112</sup> This protection includes “those agents whose services are required by the lawyer in order that he or she may properly prepare his or her client’s case.”<sup>113</sup> Clearly, investigators and mitigation specialists qualify as such agents.<sup>114</sup> Thus, to the extent they assist counsel in his duty to communicate with the client, they are also bound by counsel’s duty to maintain the confidences and privileges of the client, as discussed below.

##### *A. The Duty to Communicate with the Client*

The fundamental duty imposed by Model Rule 1.4, like Model Rule 1.1, reflects the fiduciary duty that lawyers owe their clients to communicate with them in multiple respects. First, the lawyer must inform the client fully as to any matter as to which the client must give informed consent. Second, the lawyer must consult with the client as to the means to be used in order to accomplish the client’s objectives. Third, the client must be kept reasonably informed about the status of

---

109. *Id.* at 41, 44.

110. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

111. William M. Bowen, Jr., *A Former Alabama Appellate Judge’s Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 813 (2008).

112. *See United States v. Kovel*, 296 F.2d 918, 921-22 (2d Cir. 1961) (secretaries, paralegals, legal assistants, stenographers or clerks are privileged agents); 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5482, at 264-65 (1986); 1 JOHN W. STRONG, *MCCORMICK ON EVIDENCE* § 91, at 364-65 (5th ed. 1999).

113. *State v. Pratt*, 398 A.2d 421, 423 (Md. 1979).

114. *United States v. McPartlin*, 595 F.2d 1321, 1335-37 (7th Cir. 1979).

the matter. Fourth, the lawyer must comply with the client's requests for information. Fifth, the lawyer must explain to the client the limitations placed by the rules on what the lawyer may undertake on the client's behalf. Finally, the lawyer is reminded by Model Rule 1.4 to explain matters sufficiently so the client can make informed decisions.<sup>115</sup>

The ABA Guidelines add a wonderful second dimension to this duty to communicate by emphasizing what every lawyer in every representation should recognize: Effective communication is not just in the words but in the relationship between lawyer and client. ABA Guideline 10.5 starts by admonishing the lawyer to develop a relationship of trust and requires the maintenance of "close contact with the client."<sup>116</sup> In emphasizing both early and frequent contact, the ABA Guidelines are reminding lawyers of the important building blocks to effective communication, reminding lawyers that through the client's eyes, the idea of trust may not be the first response a new client might have, that this responsibility cannot be delegated to others and that the development of rapport takes time and might involve the participation of others, such as family members, beyond the client himself.<sup>117</sup> The ABA Guidelines also make the point, one reemphasizing the importance of Model Rule 1.4, that the lawyer who has done a better job of communicating with the client will also be in a better position to communicate on the client's behalf.<sup>118</sup>

Lawyer-client communication is "the heart of the attorney-client relationship."<sup>119</sup> Supplementary Guidelines 5.1(C) and 10.11(C) recognize that effective representation requires the team to build rapport with the client. Supplementary Guideline 5.1(C), addressing the qualifications of the defense team, notes that the mitigation specialist's ability to build rapport is necessary "to overcome barriers . . . against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures."<sup>120</sup> Supplementary Guideline 10.11(C) requires the team to conduct "in-person, face-to-face, one-on-one interviews" and advises that "[m]ultiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and

---

115. MODEL RULES OF PROF'L CONDUCT R. 1.4 & cmt. (2007).

116. ABA GUIDELINES, *supra* note 7, at Guideline 10.5(A).

117. *See id.* at Guideline 10.5, commentary; *see also* Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 969-70 (2008).

118. *See* ABA GUIDELINES, *supra* note 7, at Guideline 10.5, commentary.

119. John M. Burman, *The Duty of Communication Under the New Wyoming Rules*, WYO. LAW., Oct. 2007, at 44, 47.

120. SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 5.1(C).

reliable life-history investigation.” Supplementary Guideline 10.11(C) further advises that such rapport is “necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.”<sup>121</sup>

The duty to communicate is “both an ethical and legal duty of the lawyer.”<sup>122</sup> The ethical duty derives from the *ABA Model Rules of Professional Conduct*, which characterize the duty as one to explain things sufficiently so that the client can make informed decisions.<sup>123</sup> Failure of a lawyer to communicate with his client damages, if not destroys, the lawyer-client relationship, and may result in sanctions by state boards and ethics committees.<sup>124</sup>

The ethical duty of communication exists in any lawyer-client relationship. In the context of capital defense the duty is particularly demanding. ABA Guideline 10.5 (Relationship With the Client) requires counsel to “establish a relationship of trust with the client, and . . . maintain close contact with the client.”<sup>125</sup> The requirement expressly extends to all stages of representation and requires counsel to “engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case.”<sup>126</sup> Commentary to the ABA Guidelines discusses some of the challenges posed by capital clients:

Many capital defendants are . . . severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment

---

121. *Id.* at Guideline 10.11(C).

122. Burman, *supra* note 119, at 44.

123. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2007).

124. *See, e.g.,* People v. Duitch, 2007 WL 4731007, at \*1-4 (Colo. O.P.D.J. Nov. 27, 2007) (attorney disbarred for client neglect and conversion of funds); People v. Marsh, 2006 WL 702003, at \*1 (Colo. O.P.D.J. Mar. 17, 2006) (attorney suspended from the practice of law for conversion of funds and “fail[ure] to properly communicate with his clients”); People v. Caughron, No. 05PDJ065, 2005 WL 2708267, at \*1 (Colo. O.P.D.J. Oct. 12, 2005) (attorney suspended and placed on probation for violating multiple rules of professional conduct, including the duty to communicate with clients); Fla. Bar v. Baron, Nos. SC03-490, SC03-1009, 2003 WL 23996016, at \*3-4 (Fla. Sept. 2003) (attorney disbarred for violating multiple rules of professional conduct, including the duty to communicate with clients); Fla. Bar v. Walker, 530 So. 2d 305, 306 (Fla. 1988) (attorney disbarred for conversion of funds, fraud, and “failure to keep a client reasonably informed about the status of a matter”); *In re Harris*, 890 S.W.2d 299, 302 (Mo. 1994) (en banc) (attorney reprimanded for failing to keeping client adequately informed).

125. ABA GUIDELINES, *supra* note 7, at Guideline 10.5.

126. *Id.* at Guideline 10.5(C).



and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence.<sup>127</sup>

There are other barriers as well which impede the lawyer-client relationship in capital and indigent defense. A client's distrust of lawyers can stem not just from mental illness, but from past experiences with lawyers and the criminal justice system. In addition, "cultural differences between lawyers and the indigent clients can impede the provision of adequate defense services to indigent defendants."<sup>128</sup>

Under the professional rules, communication between the lawyer and client is necessary in order for the lawyer to properly advise his client. Given the difficulties above, communication takes time, resources, and effort. Gaining the trust of a capital client and building rapport are crucial to providing the type of assistance and advice necessary to legal representation, especially when confronting the sensitive issues that a capital defense team will confront.

The lawyer's heightened obligation to communicate with a capital client is sometimes difficult to meet. Workload of team members for example can be a major impediment to communication.<sup>129</sup> As discussed above, counsel for indigent defendants frequently grapple with high workloads and low funding. "When excessive caseloads bombard the representatives of the indigent . . . defense attorneys barely have enough time to introduce themselves."<sup>130</sup> The Commentary to the ABA

127. *Id.* at Guideline 10.5, commentary.

128. Timothy H. Everett, *Post-Gideon Developments in Law and Lawyering*, 4 CONN. PUB. INT'L L.J. 20, 43 (2004) ("In 1973 Judge Bazelon observed that [because of] cultural differences between lawyers and indigent clients . . . : 'uptown' lawyers often have a serious communication problem in dealing with an indigent defendant. They are not prepared for the cultural shock of learning that their client is neither middle class nor cast in their image of the 'deserving poor.'") (quoting David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 12 (1973)).

129. Patrick Noaker, *It Doesn't Come With the Territory: Public Defenders Must Decline to Violate Legal and Ethical Standards in the Face of Rising Caseloads*, 10 CRIM. JUST. 14, 17-18 (1995) ("Probably the most immediately obvious and distressing area affected by an unwieldy caseload is client communication"—discussing *In re Stricker*, 808 S.W.2d 356, 358 (Mo. 1991) (en banc) (attorney violated an ethical duty to communicate by being unavailable by phone and clients contacted the circuit clerk's office to try to reach him); *In re Gray*, 813 S.W.2d 309, 312 (Mo. 1991) (en banc) (attorney failed to return a client's telephone calls and to communicate with the client by telephone or correspondence regarding developments in the client's case constituted a violation of ethical duties); *In re Stewart*, 782 S.W.2d 390, 392-93 (Mo. 1990) (en banc) (attorney disbarred for, among other things, failing to keep clients informed despite repeated requests)).

130. David L. Wilson, *Constitutional Law: Making a Case for Preserving the Integrity of Minnesota's Public Defender System*: Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996), 22 WM. MITCHELL L. REV. 1117, 1139 (1996); see also S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 04-12 (2004). As described by the South Carolina Ethics Advisory Committee:

A public defender may not undertake or maintain a caseload that results in the attorney violating ethical obligations of competence (Rule 1.1), diligence (Rule 1.3), and

Guidelines recognizes that a “mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.”<sup>131</sup> However, the Commentary makes clear that, consistent with the *Model Rules of Professional Conduct*, the ethical duty falls squarely on the shoulders of counsel.<sup>132</sup>

*B. The Duty to Protect Confidential Client Information—Rule 1.6*

The importance of the Model Rule establishing the fiduciary obligation of confidentiality is very much reflected in ABA Guideline 10.8 (Relationship with the Client), and throughout the Supplementary Guidelines. This is because the foundation of the development of a relationship of trust with the client must be a commitment—an oft-repeated commitment—to maintaining the confidences of the client. The Supreme Court has described “the attorney-client privilege under federal law, as ‘the oldest of the privileges for confidential communications known to the common law.’”<sup>133</sup> The Supplementary Guidelines make the point that the privilege is of utmost importance in legal proceedings in which the client’s life hangs in the balance.

The very *raison d’être* of the confidentiality obligation is the fact that, as hard as it is to convince clients they should share their innermost concerns with their lawyers, one way to overcome that reluctance is to pledge that the lawyers’ lips are sealed. The privilege exists “to encourage full and frank communication between lawyers and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>134</sup> In the world of capital litigation, this commitment becomes even more important because the need for client trust is higher and the stakes are so profound. The Supplementary Guidelines appropriately make repeated reference to the duty of the

---

communication (1.4). In deciding whether the attorney’s caseload is resulting in ethical violations, national caseload standards are a factor to be considered but are not determinative. Instead, the attorney should decide whether the attorney’s caseload is interfering with basic functions required of lawyers, such as communication . . . .

*Id.*

131. ABA GUIDELINES, *supra* note 7, at Guideline 10.5, commentary.

132. *Id.* (“Although, . . . ongoing communication by non-attorney members of the defense team is important, it does not discharge the obligation of counsel at every stage of the case to keep the client informed of developments and progress in the case, and to consult with the client on strategic and tactical matters.”).

133. *United States v. Zolin*, 491 U.S. 554, 562 (1989) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

134. *Upjohn*, 449 U.S. at 389.

entire defense team to maintain the confidentiality of client communications.<sup>135</sup> Under no circumstances should counsel in a capital case proceed in a fashion that enables the prosecution to use members of the defense team as state's witnesses against the accused.<sup>136</sup>

It follows as a matter of the highest ethical imperative not just that "it is counsel's obligation to insist upon making [requests for needed resources] ex parte and in camera,"<sup>137</sup> but that lawyers have a duty under the professional rules to go to the limit to defend the confidentiality of the legal and factual investigative work of the defense team in the event that a court fails to respect this core principle.<sup>138</sup> After all, the ultimate purpose of mandating confidentiality so as to ensure the effective representation of each individual client is to benefit the criminal justice system as a whole.<sup>139</sup>

ABA Guideline 10.5(B)(2) highlights yet another related ethical obligation of the lawyer, stating: "Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding . . . preservation of the attorney-client privilege and similar safeguards."<sup>140</sup> Actually, the ethical obligation of the lawyer is broader than that. The lawyer must take all steps necessary to assure that the attorney-client privilege is maintained. This means the lawyer must conduct conversations outside the earshot of those who would destroy the privilege and otherwise communicate in ways that will be deemed privileged. Further, as the Supplementary Guidelines state: "Counsel must provide mitigation specialists with knowledge of the law affecting their work, including . . . rules affecting confidentiality, disclosure, privileges and protections."<sup>141</sup>

---

135. See SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 4.1(C) (all defense team members "are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client"); *id.* at Guideline 4.1(D) (counsel must inform non-attorney defense team members of "rules affecting confidentiality, disclosure, privileges and protections"); *id.* at Guideline 5.1(C) (mitigation specialists must have the skills to conduct interviews that produce "*confidential*, relevant and reliable information") (emphasis added).

136. *Delap v. State*, 440 So. 2d 1242, 1246-47 (Fla. 1983).

137. ABA GUIDELINES, *supra* note 7, at Guideline 10.4, commentary; see SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 4.1(A).

138. Every first year law student learns about the protection of attorney work product from *Hickman v. Taylor*, 329 U.S. 495 (1947). But that is only because attorney Fortenbaugh, in the entirely appropriate performance of his ethical duties, went into contempt to vindicate his clients' rights. *Id.* at 499-500.

139. See *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) ("Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital.").

140. ABA GUIDELINES, *supra* note 7, at Guideline 10.5(B)(2).

141. SUPPLEMENTARY GUIDELINES, *supra* note 6, at Guideline 4.1(D).

Counsel must also organize the defense team in such a way as to utilize these protections for the maximum benefit of the client. The ABA Guidelines specifically direct counsel to “structure the [defense] team in such a way as to distinguish between experts who will play a ‘consulting’ role, serving as part of the defense team covered by the attorney-client privilege and work product doctrine, and experts who will be called to testify, thereby waiving such protections.”<sup>142</sup> It is well established that the investigator in a defense team, as an agent or representative of counsel, also must maintain confidentiality of all communications with the client as well as act in a manner that preserves the work product privilege.<sup>143</sup> The ABA Guidelines thus properly advise that the mitigation specialist, who is also a member of the defense team, and thus an agent of counsel, be properly supervised in all his or her endeavors, so as to enjoy the benefit of the work product privilege.<sup>144</sup> But it is absolutely necessary, in order to preserve these “vital” privileges and protections, that counsel make the decision whether a consultant will testify early on, lest he or she be placed in jeopardy of exposing privileged communications or otherwise non-discoverable information from or about his client.

## V. CONCLUSION

Nearly twenty years ago, a Maryland court observed that “given the complexities of modern existence, few if any lawyers could, as a practical matter, represent the interest of their clients without a variety of nonlegal assistance.”<sup>145</sup> The world has not become any less complex since those words were written, particularly not with respect to the litigation of death penalty cases. As the ABA Guidelines and related

---

142. ABA GUIDELINES, *supra* note 7, at Guideline 10.4, commentary; *see also* Mickell Branham & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019, 1026-28 (2008).

143. *See* FED. R. CIV. P. 26(b)(3); *Nobles*, 422 U.S. at 238-39.

At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

*Nobles*, 422 U.S. at 238-39.

144. ABA GUIDELINES, *supra* note 7, at Guideline 10.4; *see also* United States v. Johnson, 378 F. Supp. 2d 1041, 1049 (N.D. Iowa 2005) (social history chronology prepared by the mitigation specialist was subject to work product privilege).

145. *State v. Pratt*, 398 A.2d 421, 423 (Md. 1979).

commentary observed, multidisciplinary defense teams that include mitigation specialists have become part of the “existing ‘standard of care’” in capital cases.<sup>146</sup> Lawyers must take affirmative steps to preserve the fiduciary obligations of the legal profession, including competence, independence of professional judgment, protection of confidential client information, and loyalty to the client. The Supplementary Guidelines are a welcome resource to help both lawyers and nonlawyers provide effective and ethical client services in death penalty cases.

---

146. ABA GUIDELINES, *supra* note 7, at Guideline 4.1, commentary.